80-1353

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

ANDREW J. WINSTON, Sheriff,
City of Richmond,

and

DON HUTTO, Director of
Department of Corrections,

Petitioners

v.

ROBERT G. EBY

and

FRANKLIN M. PHILLIPS,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPINIONS BELOW

The opinion of the Court of Appeals is unreported and set forth in petitioners' Appendix A. The decisions of the United States District Court are set forth in petitioners' Appendix B.

JURISDICTION

Petitioners claim that jurisdiction is founded upon 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does a master jury list composed of twenty-five percent women meet the fair-cross-section of the community requirements of the Sixth Amendment?

II. Does the exemption from jury service of "women" necessarily and personally responsible for children sixteen years of age or younger represent a significant state interest to justify a failure to attain a fair-cross-section of the community under the Sixth Amendment?

III. Did the respondents make out a prima facie case of jury discrimination?

* * * *

STATEMENT OF THE CASE

The respondents generally accept the statement of the case set forth by the peti-

tioners except to their contention that the State trial judge rejected the stipulation between the State prosecutor and respondents. The stipulation regarding the gender composition of the master jury list and the venire from which the petit jury was drawn constituted the only evidence ever submitted in this regard.

ARGUMENT

I

A MASTER JURY LIST COMPOSED OF TWENTY-FIVE PERCENT WOMEN DID NOT REPRESENT A FAIR-CROSS-SECTION OF THE COMMUNITY UNDER THE SIXTH AMENDMENT.

Undeniably, a defendant in a criminal proceeding has a right to a jury drawn from a source reasonably representative of a fair-cross-section of the community. Duren v. Missouri, 439 U.S. 357 (1979). Otherwise, a jury would not be the voice of the entire community but an organ of special groups and

and classes.

In this case while 50% of the adult community population was female; only 25% of the master jury list,[1] only 20% of the examined venire, and only 17% of the jurors selected were women.[2] This underrepresentation of women on the master jury list during a two year period and on the respondents' jury panel was a substantial disparity in light of the process and mechanisms by which jurors were selected in Hanover County, Virginia. Turner v. Fouche, 396 U.S. 346 (1970). A review of this procedure by which potential jurors were selected will follow.

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[1] In the previous year, 1976, 24% of the master jury list were women.

[2] Contrary to petitioners' claim that respondents agreed to excuse two women from the list of 24 potential jurors, only one woman, Evelyn Melton Leadbetter, was excused -- by the Court -- as a result of her husband's interest in a certain property which the State prosecutor stated might be involved in the case.

First of all, the jury which convicted the respondents was selected under a system where "key"[3] people selected names from people they knew or heard about. This type of subjective system has been repeatedly criticized for its inherent tendency to foster discrimination. Castaneda v. Partida, 430 U.S. 482 (1977) and Hernandez v. Texas, 347 U.S. 475 (1954)

The jury commissioners for 1977 were not authorized to employ random selection techniques under the then optional alternative of the Va. Code Ann. §8-208.10 (Cum.Supp.1976). A random selection process is now mandatory in Virginia by statute.[4] §8.01-345 Va. Code Ann.

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[3]Four of the five jury commissioners who selected the master jury list were males.

[4]According to Virginia's Brief in Opposition to Grant Writ of Certiorari, Case #78-5796, October Term 1978, ". . . any decision by this Court in the present would apply to this case alone and would have no significant impact upon jury selection in Virginia." At p. 4. Interestingly enough, the Attorney General concluded that Brief by stating ". . . issues raised in this case are neither important nor substantial and that the Court should deny the petition for writ of certiorari." p.5.

Secondly, the commissioners were not aided by the existence of any objective standards that might have been readily applied uniformly. The testimony of the Jury Commissioners suggested they did not seek out qualified women in numbers reflective of their representation in the community; their only reported effort of obtaining a cross-section was in terms of geographical representation.

Lastly, at least two of the commissioners, as evidenced by their affidavits, intentionally and arbitrarily excluded from consideration those women who they knew cared for infant children.

In this regard, Virginia did authorize the exemption of persons who had legal custody of and who were necessarily and personally responsible for a child or children sixteen years of age or under <u>if such persons</u>

notified the jury commissioners.[5] (Emphasis supplied) However, only women with small children were summarily excluded from the master jury list; clearly in violation of the aforesaid statutory mandate. From the affidavits it is clear that the exemption was not applied uniformly to men and women alike and prospective women jurors were exempted from the master jury list without claiming the exemption. It is fundamental that a person who is exempted from jury duty may nevertheless elect to serve since an exemption is a personal matter which can be waived. Therefore, two Jury Commissioners did not comply with the procedures for jury selection pursuant to Va. Code Ann. §8-208.

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[5] In effect at the time of respondents' trial and reads as follows: Va. Code Ann. §8-208.6(26) (Cum.Supp.1976). Any persons who notify the jury commissioners within the time and in the manner prescribed by §8-208. 10 that they have legal custody of and are necessarily and personally responsible for a child . . . during normal working hours.

6(26). This non-compliance[6] with statutory mandates renders the jury illegal and invalidates its verdict. E. O. Ballard v. United States, 329 U.S. 187, 195 (1946) and Thiel v. Southern Pacific, 328 U.S. 217 (1946).

Thus, women were substantially underrepresented in a systematic, recurrent and uniform degree. This disparity, coupled with the selection process as discussed herein, satisfied the three-part test of Duren and established an unrebutted case of denial of a jury composed of a fair-cross-section of the community.

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[6]Petitioners conceeded non-compliance on Page 7 of their petition.

ARGUMENT

II

THE EXEMPTION FROM JURY SERVICE OF "WOMEN" NECESSARILY AND PERSONALLY RESPONSIBLE FOR CHILDREN SIXTEEN YEARS OF AGE OR YOUNGER DID NOT REPRESENT A SIGNIFICANT STATE INTEREST TO JUSTIFY A FAILURE TO ATTAIN A FAIR-CROSS-SECTION OF THE COMMUNITY.

Petitoners attempt to justify the exclusion of women from jury service under the theory that States have an important interest in the welfare of children is misplaced. As previously noted, the Jury Commissioners were never authorized to exempt only women caring for the young, and Va. Code Ann. §8-208.6(26) did not authorize the Commissioners to exempt anyone unless the prospective juror notified the Commissioner of his or her desire to seek an

exemption.[7] Above all, the respondents have never challenged the validity of the aforesaid exemption as written.[8] However, the statutory exemption was misapplied by the Commissioners and no State interest was served by their actions. In the face of Duren and Taylor v. Louisana, 419 U.S. 522 (1975) it belies logic to argue that the exclusion of women in violation of State law did not violate rights under the Sixth and Fourteenth Amendments to the Constitution of the United States.

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[7]There is no evidence that any woman who was caring for a child under sixteen years of age claimed the exemption by notifying the Jury Commissioners as proscribed by statute.

[8]Obviously the care of children is a matter of State importance and should be uniformly regulated.

ARGUMENT

III

THE RESPONDENTS CLEARLY MADE OUT A PRIMA FACIE CASE OF JURY DISCRIMINATION.

Petitioners argue that the statistics regarding the 1976 and 1977 master jury list composition by sex and the 1970 census figures for adult population of Hanover County by sex, all of which were stipulated to by the prosecution and respondents at the State Court trial, should have been disregarded by the District Court in considering respondents' habeas corpus petition. It should be noted that those stipulations constituted the only evidence submitted to either the State trial Court or in the instant habeas proceedings regarding the composition of the master jury lists by sex or the composition by sex of adult population from which the jury lists were drawn. Such stipulations have been

deemed conclusive of the facts, e.g., Dooley v. Commonwealth, 198 Va. 32, 35, 92 S.E.2d 348, 349 (1956), and preclude a later change in position by a party. E.g., McLaughlin v. Gholson, 210 Va. 498, 171 S.E.2d 816 (1970).

The petitioners have claimed that in denying respondents' Motion to Quash the Master Jury List, the State trial judge "rejected the stipulations as proving the facts." Indeed, the petitioners sought to impeach the State trial Court record with an affidavit of the trial judge executed more than two years after ruling upon the motion. As noted before, it would have been improper for the trial judge to ignore the stipulated facts. Dooley v. Commonwealth, supra. But even assuming arguendo, that the trial judge could have ignored the stipulated facts, he did not. An examination of the record reveals that the State trial judge made some quarrelsome comments, noting that women sometimes have names

normally identified with men (to which counsel responded that reference had been made not only to names, but also to forms of address, such as "Mrs.")and asserting that the stipulation established only "that this would be the evidence if you put it on" and "not a stipulation that it's an absolute fact." (to which counsel, who had previously noted in response to similar comments that the stipulated evidence was uncontradicted, answered, "There are very few absolute facts.") but never expressly rejected the stipulations. Moreover, the State trial judge's explanation of his ruling on the motion indicates that he accepted the stipulated percentages, but believed them insufficient to establish a denial of Constitutional rights. The trial judge stated:

> THE COURT: Well, the master jury list; I don't think there's any, uh, uh, uh -- the necessary proof or enough proof that the jury was --- master jury list was selected illegally. I don't think --- if you recall, one of

> the jury commissioners, you were talking about percentages and you all consented to all that, I don't think that's sufficient to throw out a master jury list. If you go that far, then you're going to say you've got to have -- find out how many reheaded men there are in the county and you've got to get the same percentage of redheaded men, etcetera. I just don't believe your argument on the jury list is sound at all." TR

As the District Court found, "the trial judge did not reject the statistical evidence, but merely emphasized its limitations."

The record conclusively established, as the District Court noted, that the stipulations of fact were entered into by counsel representing respondents and the prosecuting attorney. Since the petitioners offered no evidence showing why the stipulation was unreliable it should be accepted as relevant evidence. Castaneda v. Partida, 430 U.S.482 at 496 (1977). After all, Spanish names provided ready identification of the members of this class in Hernandez v. Texas, supra. Allow the petitioners to now be released from that

stipulation would as the District Court pointed out, work an extreme injustice.

> "The petition was decided without an evidentiary hearing, solely upon the State court records. Petitioners, at trial did not offer evidence on the gender composition of the jury because the need for such proof was obviated by the stipulation. In seeking to avoid the effect of the stipulation, respondents would, on the one hand, expunge petitioner's evidence from the record, while on the other hand, condemn petitioners for the absence of such proof. Such contentions are not only illogical, but devoid of fairness on their face."

See also, e.g., Marshall v. Emerson's Ltd., 593 F.2d 565 (4th Cir. 1979); Maryland Casualty Co. v. Richenbaker, 146 F.2d 751, 753 (4th Cir. 1944).

CONCLUSION

For the reasons presented, the respondents respectfully submit that the petitioners have failed to present any special or important reasons why their petition for Writ of Certorari

should be granted;[9] and therefore the petition should be denied.

Respectfully submitted,

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[9]Rule 17, Rules of the Supreme Court of the United States.

CERTIFICATE OF SERVICE

I, Michael Morchower, Esquire, counsel for the Respondents, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 10th day of March, 1981, I mailed a copy of the foregoing brief in Opposition for Writ of Certiorari to J. Marshall Coleman, Attorney General of Virginia and James E. Kulp, Deputy Attorney General of Virginia, 900 Fidelity Building, 830 East Main Street, Richmond, Virginia 23219, Counsel of Record for Petitioners.

Michael Morchower

Michael Morchower

AFFIDAVIT OF SERVICE

In accordance with Rules of the Supreme Court of the United States, I hereby certify that I have this 10th day of March, 1981, filed the required copies of the Respondent's Brief In Opposition To Petition For Writ of Certiorari in the Clerk's Office of the Supreme Court of the United States.

BY: Barbara E. Grove

Lawyers Printing Co.
P. O. Box 1654
Richmond, Va. 23219

March 10, 1981

Sworn to before me this 10th day of March, 1981.

Cynthia J. Hray
NOTARY PUBLIC FOR VIRGINIA

My Commission Expires: 8/10/84